

STATEMENT OF

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**BEFORE THE**

**UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON ENERGY AND COMMERCE  
SUBCOMMITTEE ON COMMERCE, TRADE, AND  
CONSUMER PROTECTION**

**ON**

***FAIR USE: ITS EFFECTS ON CONSUMERS AND  
INDUSTRY***

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It is a pleasure to be here today to discuss fair use, a concept that is, by consensus, one of the most perplexing in the galaxy of intellectual property issues.

My starting point is the fundamental nature of national policy and law on intellectual property.

Much of the legal literature starts from the premise that the purpose of the Copyright Clause is to promote the interests of consumers, not creators, and that the needs of the latter are to be taken into account only to the degree necessary to keep them working. In this orientation, most obvious in law reviews and legal briefs but spilling over into the general press, the purpose of copyright law is to dribble out as little as possible to creators. There is also great emphasis on a "balance" between consumers and creators, as if we were in some zero-sum game in which the two quarrel over a limited pie.

This framework is bad history, bad economics, bad law, bad morality, and bad policy.

At root, creative products are like any other goods and services. Producers want to produce them; consumers want to consume them. The link between these complementary desires is property rights and the market system. We do not speak of the need for legal doctrines that fine tune the "balance" between automobile manufacturers and drivers. We rely on the interests of all parties in interacting. We have some general rules to protect against fraud, some special rules to protect against problems of monopoly, and other than that we rely on the market to enable consumers and producers to fine tune that balance for themselves.

This is, and should be, our model for intellectual property as well. Creators want to create, and they are desperately anxious to find markets for their works. Consumers want access to the works. The fundamental need is not for a "balance," whatever that might be, but for a working market system.

Indeed, one of the best things about the Supreme Court's recent opinion in *Eldred* was its forceful rejection of this pernicious idea that the rights of consumers and creators are in conflict:<sup>1</sup>

As we have explained, "[t]he economic philosophy behind the [Copyright] [C]lause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors." *Mazer v. Stein*, [347 U. S. 201, 219](#) (1954). Accordingly, "copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge... . The profit motive is the engine that ensures the progress of science." *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (SDNY 1992), *aff'd*, 60 F. 3d 913 (CA2 1994). Rewarding authors for their creative labor and "promot[ing] ... Progress" are thus complementary; as James Madison observed, in copyright "[t]he public good fully coincides ... with the claims of individuals." *The Federalist* No. 43, p. 272 (C. Rossiter ed. 1961). *Justice Breyer's* assertion that "copyright statutes must

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<sup>1</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 212 fn. 18 (2003) .

serve public, not private, ends" *post*, at 6, similarly misses the mark. The two ends are not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones. [Brackets in *Eldred*.]

This system of intellectual property and markets has served American society very, very well. Several recent studies examine the economic pay-off, and they probably understate the case.<sup>2</sup> In my view, those wanting to depart from this model of using property rights and markets as the incentives and organizers of creative effort bear a heavy burden of proof. And I have yet to see them meet it. They tend to argue in abstractions. For example, they simply assume that intangible products are different from tangible goods. In fact, the two are different in some ways, not different in others, and in some instances those differences cut in favor of more extensive property rights in intangibles and in some they argue for the reverse.<sup>3</sup> But the legal literature contains little work analyzing these distinctions in any depth.

Another argument is that because of the Internet things are different, and the need for property in creative products somehow lessened. The technology may be changing rapidly, but the laws of human nature and of economics are not, and as the investment gurus note cynically: "The four most dangerous words in the English language are, 'This time it's different.'" The circumstances may be different, but the fundamental values and principles are not.

An indispensable part of any system of property in creative products is that the works must be protected. Something that cannot be protected cannot really be property, and cannot be produced through any system that depends upon payment.

In the past, protection for creative works could be provided reasonably well by a combination of law and technological impossibility. Even the mighty copying machine did not result in wholesale book piracy because it remained cheaper to print books than to use copying machines. (Though it did result in considerable copying of academic materials, and turned the journals market upside down.) Audiotape degrades with repetitive copying, so it was not a serious threat to music. Movies on film might as well have been in a vault.

The combination of digitization and the Internet have changed this situation, of course, by

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2. Stephen E. Siwek, *Engines of Growth: Economic Contributions of the U.S. Intellectual Property Industries*. Economists Incorporated (2005) (Commissioned by NBC Universal) [[http://nbcumv.com/corporate/Engines\\_of\\_Growth.pdf](http://nbcumv.com/corporate/Engines_of_Growth.pdf)]; International Chamber of Commerce, *Intellectual Property: Source of innovation, creativity, growth, and progress* (Aug. 2005). [[http://www.iccwbo.org/uploadedFiles/ICC/policy/intellectual\\_property/Statements/BASCAP\\_IP\\_pub.pdf](http://www.iccwbo.org/uploadedFiles/ICC/policy/intellectual_property/Statements/BASCAP_IP_pub.pdf)]; Robert A. Shapiro & Kevin J. Hassett, *The Economic Value of Intellectual Property*. USA for Innovation (Oct. 2005) [[http://www.usaforinnovation.org/news/ip\\_master.pdf](http://www.usaforinnovation.org/news/ip_master.pdf)].

3. James V. DeLong, "Defending Intellectual Property," in Adam Thierer & Clyde Wayne Crews, Jr. (eds.), *Copy Fights: The Future of Intellectual Property in the Information Age*. Cato Institute (2002) [<http://www.pff.org/issues-pubs/books/020101defendingip.pdf>].

making possible the once impossible. The capacity for perfect digital replication of music, movies, and software renders the old forms of protection inadequate. Printed works books are still protected by printing costs combined with people's distaste for reading works on a screen, but that is changing as e-paper develops, and authors and publishers will soon face the same problems as other creators. Indeed, the recent controversy over Google Print indicates that the day is already at hand.

This description of the property-and-market basis of intellectual property law and policy and of the problems both legal and technological is the starting point for analyzing fair use.

If one views the purpose of the various doctrines that fly the flag of fair use, and the role of a judge implementing them, as being to allocate property rights among various sets of creators, consumers, and middlemen according to some gut sense of fairness, one will quickly sink in a swamp of gooey generalization.

Unfortunately, "swamp of gooey generalization" does indeed seem to be the best description of the state of this law. In 1990, Judge Pierre N. Leval noted that the fair use provisions in the 1976 Copyright Act were pretty much the summary of the law stated by Justice Story in 1841 ("In short, we must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work"), and this was itself a rationalization of common law doctrines that had developed since the Statute of Anne in 1709.<sup>4</sup> He added that "These formulations, however, furnish little guidance on how to recognize fair use," and that:

Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones. Reversals and divided courts are commonplace. The opinions reflect widely differing notions of the meaning of fair use. Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns. Justification is sought in notions of fairness, often more responsive to the concerns of private property than to the objectives of copyright.

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4. Pierre N. Leval, "Toward a Fair Use Standard," 103 *Harvard Law Review* 1105, 1106-07 (1990). The statutory provision is 17 U.S.C. 107:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Instead of bogging down in "intuitive reactions to fact patterns," it makes the most sense to examine fair use as a set of doctrines developed to make a market system for creative works function better by putting some oil in the joints when necessary, when there are good reasons for thinking that the system will break down. This is not a novel framework. My files have a 1982 article by Professor Wendy Gordon analyzing fair use doctrine in terms of market failures, and there may have been other suggestions along the same lines.<sup>5</sup>

One probably should start with a couple of doctrines not classified as fair use but very closely related: the rules that neither facts nor basic ideas can be copyrighted. One can copyright only particular expressions of ideas or particular arrangements of facts.

These two limitations on the assertion of property rights are important. They ensure that no one encloses the intellectual commons, so to speak. And some fair use principles are closely related to these rules: the right of news stories to use snippets of copyrighted material, for example, or the right of a biographer to quote copyrighted but unpublished correspondence to make a point about the subject. It is a *fact* that such and such was said. Often, a debate that seems to be about fair use is actually a debate about facts or ideas -- is the material eligible for protection at all?

Turning to core fair use issues, in developing copyright doctrine it is usually reliable to assume that producers want to disseminate their work, since creators need to support both their bodies and their egos. But this is not foolproof, because producers may well wish to discourage some types of dissemination. Most authors would cheerfully deny the right to quote from their works to anyone who wants to write a bad review. Creators often lack a sense of humor about their efforts, too, which makes them unsympathetic to satire and parody. If such forms of expression are to occur, they require special protection, because the joints of the marketplace will be a bit stiff.

Related problems can arise when the creator of a fictional universe is reluctant to let anyone else enter it. A couple of years ago there was a brouhaha about *The Wind Done Gone*, a retelling of the *Gone With the Wind* saga from a slave's point of view. Fan sites on the Internet present a related situation. Here again one can analyze the situation in terms of a breakdown in the normal market incentives. The creator of a fictional universe has a legitimate claim to control of its exploitation, on the one hand. On the other, as in the case of satire and parody, the creator may resist riffs that push the situation in some new direction.

The most important issues of fair use, though, fit well into the market paradigm because they revolve around transaction costs. In many situations, the time and effort involved in obtaining permission to use material would be so out of proportion to the value of the use or to any possible harm to the creator that the only reasonable answer is, "forget it." The concept of transaction costs has received little explicit attention in the cases, but it seems to underlie much

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5. Wendy J. Gordon, "Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and Its Predecessors," 82 *Columbia Law Review* 1600 (1982) [Note: *Betamax* here meant the Court of Appeals decision, not the case in the Supreme Court].

fair use analysis. It was used explicitly in *Texaco*.<sup>6</sup>

The transaction cost framework certainly governs day-to-day life. Which of us, upon reading a news article that might interest a friend, would even think about seeking permission from the newspaper before making a copy? We regard space shifting -- such as putting a copy of a CD onto a computer -- as a natural thing to do, without seeking permission from the music publisher. (The music industry agrees. Its website specifically approves such action, even though it stops short of classifying it as "fair use.")

The CD example is particularly interesting because it embodies an intuitive public sense of the distinction between the price of the content and the price of the delivery mechanism. When I buy a CD, much of the cost is due to the physical distribution costs of CD pressing, shipping, inventory, wastage, and so on. If I have a copy, after paying these costs, and the costs of making another copy from it are small, then it makes little sense for me to be forced to pay those physical distribution costs all over again, and I rebel.

On the other hand, if the music company were to offer me a variety of price points, such as paying \$20 for a CD that works in a CD player and can be downloaded onto a computer and a personal device, or paying only \$15 for one that works only in my CD player, I would change my mind about fair use. The transaction cost rationale would have disappeared, and why should the light user subsidize the intensive one?

Focusing on fair use as a transaction cost issue might diminish its scope in the above example, but it would expand it the doctrine in other areas. The *Eldred* litigation highlighted the problem of orphan works -- those which are under copyright, but for which the owners cannot be found with reasonable effort. Judge Richard Posner has suggested a system whereby using orphan works would be classified as fair,<sup>7</sup> and submissions in the ongoing Copyright Office proceeding on orphan works lend support to this view.<sup>8</sup>

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6. *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (SDNY 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994). See also *Williams & Wilkins Co. v. United States*, 487 F. 2d 1345 (Ct. Cl. 1982), *aff'd by an equally divided Court*, 420 U.S 376 (1985):

The supply of reprints and back numbers is wholly inadequate; the evidence shows the unlikelihood of obtaining such substitutes for photocopies from publishers of medical journals or authors of journal articles, especially for articles over three years old. n17 It is, moreover, wholly unrealistic to expect scientific personnel to subscribe regularly to large numbers of journals which would only occasionally contain articles of interest to them. Nor will libraries purchase extensive numbers of whole subscriptions to all medical journals on the chance that an indeterminate number of articles in an indeterminate number of issues will be requested at indeterminate times. The result of a flat proscription on library photocopying would be, we feel sure, that medical and scientific personnel would simply do without, and have to do without, many of the articles they now desire, need, and use in their work.

However, the court in *Williams & Wilkins* was unwilling to adopt the idea that fair use could be contingent -- that a use might be fair if no licensing system were in place, but changes status when such a system becomes available. Given its analysis, this rejection seems irrational.

7. Richard A. Posner & William F. Patry, "Fair Use and Statutory Reform in the Wake of *Eldred*," 92 *California Law Review* 1639 (2004).

8. Library of Congress, Copyright Office, "Orphan Works," 70 Fed. Reg. 3739 (Jan. 26, 2005)

In a particularly striking case, the American Historical Association wanted to publish an online version of a collection of Civil War newspaper editorials, originally published in 1931, with copyright renewed in 1959 by the editor, Dwight Dumond:<sup>9</sup>

Obituaries confirmed that Dr. Dumond passed away in 1976 and that a wife and two children survived him. We then consulted with Dumond's former colleagues to help locate his relatives and their possible whereabouts (we knew his son was living in Guam in 1976 and his daughter in California, due to searches of older city/state directories—no newer information, however could be found). Contact was made with university libraries, Masonic lodges (to which Dumond belonged), and even veterans' associations (since Dumond fought in World War I). The AHA staff even contacted the Washtenaw County Probate Office to request a copy of Dumond's will, in which we discovered that his financial effects had been ceded to a trust company (who would presumably control any royalties generated by the book) that no longer exists. These numerous problems forced us to abandon our project since we could not protect ourselves from infringing upon the possible copyholder's rights. Despite considerable expense and effort, we were unable to make available work that is only of historical and scholarly, rather than commercial, interest.

It would be difficult to think of a stone left unturned by the AHA in this instance. Furthermore, Dwight Dumond was reasonably prominent; [www.abebooks.com](http://www.abebooks.com) (a used book site) lists several of his works. If title could not be traced in his case, it is an indication of a serious underlying problem.

A crucial point is that *fair* use and *free* use are not the same thing. Consumers' interest is in having creative works readily available, in the same sense that consumers have a strong interest in having a good supply of decent food available in the supermarket. In neither case does this mean that the cost should be zero. Indeed, to the extent that payment systems would encourage the development of new delivery techniques, consumers are much better off to be able to pay than to hold out for free on the basis of some abstract concept of "fair."

To return to the newsclip example used above: In fact, making a copy of a news story is not free; the copying costs me a few cents, plus my own time at the machine. Would I have any legitimate objection if the newspaper wanted a payment, too? Suppose it made available a service whereby I got the article online and could email it to a friend for a \$0.10 micropayment -- would my copying of the article still be a fair use? I suggest not. The high-transaction-cost rationale no longer exists. Furthermore, in the long run, I as a newspaper reader am better off if newspapers develop this added source of revenue, because if they do not there soon may be no newspaper articles for me to copy. *New York Times* columnist Joseph Nocera wrote recently:<sup>10</sup>

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9. Comment of the American Historical Association, March 25, 2005 [<http://www.copyright.gov/orphan/comments/OW0676-AHA.pdf>].

10. Joseph Nocera, "Staring down the barrel of the Internet," *International Herald Tribune*, Nov. 13, 2005 <http://www.iht.com/articles/2005/11/13/yourmoney/mjoe12-web.php>

As a business journalist, I've tended not to have a lot of sympathy for music executives trying to salvage their broken business model. My general view has been that if they can't adapt to the Internet deserve their fate. But in the six months I have been in the newspaper business, I've learned to have some sympathy for those who are staring down the barrel of the Internet.

There is something fundamentally perverse about a concept of fair use that says, "Well, we would have a right to get it for free if there were anything to get, so we will stand on our 'rights' even at the cost of keeping us from getting anything at all."

Thinking in terms of transaction costs illuminates many of the complaints about fair use in the public press. One reads of the problems of students or professors who want to put a music or film clip into a report or teaching module, and who are frustrated by the inability to download snippets of material. My reaction is "pay for it." Ring tones are now a multi-billion dollar business; if there is a market for snippets of material to be used in reports, then it will be easy enough for the owners of the content to supply them, if appropriately rewarded.

Again, "free" and "fair" are not the same thing, and, as Judge Leval also noted, in connection with the argument that artists should be able to make free use of the work of other artists:<sup>11</sup>

Artists, no matter how great, must pay for what they use in making their works. They pay for paint, for canvas, for steel, for clay, for a model's time. Why should they not also pay a reasonable fee for the use of another artists work as part of a new work?

These points, and especially Joseph Nocera's point about a "broken business model" is a good segue into my final point. Yes, the old business models for selling content are broken, but the content industry is now roaring back with élan. One is hard put to keep up with the flood of innovation. Any content company could provide an impressive list of the deals it is making to deliver new packages of content and, indeed, new kinds of content.

The common characteristic of all these deals is that they require that the property involved be protected by some form of DRM. The terms and conditions of the access granted will vary with each stream, of course, but the overall objective is to offer consumers a cornucopia of choice, matching particular desires with varying price points. All of this is greatly to everyone's benefit.

In sum, fair use is a doctrine that has outlived much of its usefulness. Properly understood, much of it is based on problems of high transaction costs at a time when the Internet is wringing transaction costs out of the system. Fair use still has a role in those areas where creators have positive incentives not to disseminate. It has a role where markets have not yet been constructed, as in the orphan works situation. But for the most part, it should be left to atrophy as the magic of technology makes new forms of content available.

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11. Pierre N. Leval, "Copyright in the Twenty-First Century: Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use," 13 *Cardozo Arts & Entertainment Law Journal* 19, 24 (1994).

So, is it fair use to copy music to a portable device, as discussed earlier? The answer should be "yes," under the old technological regime; but under the new one, the correct answer is, "Who cares"? Consumers have made clear that they expect such functionality, and the techies quickly supplied DRM that fulfills their wish. Consumers are getting these rights from the market. Perhaps in the future, as everyone gets more sophisticated, the rights granted and the price points will be calibrated more finally. Perhaps not. But it simply does not seem to be an issue with which the law, or the Congress, should be concerned. `

There is an irony here. For several years, we have been hearing pejoration about the content companies and their obsolete business models. But in the real world, as opposed to the world of academic abstraction, this is the reverse of the truth. The world of the content industries -- the marketplace -- is electric with excitement and innovation. The people defending the old doctrines are actually the ones who are mired in old models, fearful of change, and, to be blunt, trying to cling to obsolete privileges that might have been appropriate under old technologies, but not under the new.